

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2007 Session

KENNETH J. JONES v. STATE OF TENNESSEE

Appeal from the Circuit Court for Lewis County
No. 6614 Jeffrey S. Bivins, Judge

No. M2007-00397-CCA-R3-PC - Filed February 1, 2008

The Appellant, Kenneth J. Jones, was found guilty of aggravated kidnapping, evading arrest, and aggravated robbery, following a bench trial, and received an effective sentence of twelve years in confinement. The convictions of both Jones and his co-defendant were affirmed by this court on direct appeal. Jones subsequently filed a *pro se* petition for post-conviction relief alleging that he did not make a knowing and intelligent waiver of his right to a jury trial and that he received ineffective assistance of counsel. Following an evidentiary hearing, the post-conviction court determined that Jones knowingly and intelligently waived his right to trial by jury and that he failed to carry his burden on his claims for ineffective assistance of counsel. On appeal, Jones argues that his waiver of the right to a jury trial was not entered knowingly and intelligently and that he received ineffective assistance of counsel based upon the following: (1) trial counsel failed to move to sever his case from that of his co-defendant; (2) trial counsel failed to move to suppress his statement to police; (3) trial counsel failed to interview State witnesses; (4) trial counsel failed to object to the State's notice of intent to seek enhanced punishment; and (5) trial counsel failed to file mitigating factors with the trial court prior to sentencing. After review, the judgment of the post-conviction court is affirmed.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Grant C. Glassford, Franklin, Tennessee, for the Appellant, Kenneth J. Jones.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; and Jeffrey L. Long, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

The opinion of this court in the direct appeal set forth the facts in this case as follows:

On June 14, 2001, four teenagers, including the [A]ppellant[], escaped from New Hope Facility in Lewis County, Tennessee. That same day, Willadean Dobson, a sixty-nine-year-old employee of Keaton, Turner, and Spitzer law firm in Hohenwald, Tennessee, spent her lunch hour grocery shopping for her ninety-one-year-old mother. Her mother lived alone at 235 North Walnut Street in Hohenwald. When Mrs. Dobson finished her shopping, she traveled in her 1997 Cadillac to her mother's home to deliver the groceries. She entered through the front door, which was shut but unlocked. Her mother was at the beauty parlor getting a permanent when Mrs. Dobson dropped off the groceries. Mrs. Dobson took the groceries inside and set them down on a table. At that time, four individuals, "three blacks and one white," emerged from various rooms in her mother's house. Three of the individuals wore stockings over their heads, and one individual had a blue bandana around the lower half of his face. The individual with the blue bandana was also wearing a blue shirt with a white design on it.

The individuals yelled at Mrs. Dobson and forced her into a chair. They then began to duct tape her feet and her wrists together. She told the individuals that she did not have any money, so they carried her into a bedroom where they used twine and more duct tape to tie her wrists to the bedposts. After they added additional duct tape to her restraints, the "black boy in the blue shirt" stood near her holding a small hatchet. Mrs. Dobson described his actions as "being smart," hitting the hatchet against his hands in a threatening manner. The "white boy" had a hammer and was using it in the same threatening manner. The "white boy" asked if she could write them a check. The individuals then taped Mrs. Dobson's mouth shut with duct tape. The "white boy" with the hammer and the "black boy" with the hatchet appeared to be the leaders of the group.

The individuals left Mrs. Dobson in the bedroom tied to the bed while they went into the kitchen. After she heard them leave, she eventually managed to free herself from the bed and hop towards the telephone. While Mrs. Dobson was trying to get to the phone, she fell and broke her finger. She managed to get to the phone and call 911.

While at Mrs. Dobson's mother's house, the individuals took ten dollars from her mother's wallet, her purse, and her 1997 Cadillac. They also drank from a two-liter bottle of Coca Cola. As a result of being taped and tied up, Mrs. Dobson had bruises on her wrists. During the time she was being held captive, Mrs. Dobson was in fear for her life.

Dewayne Kilpatrick, the Lewis County Sheriff, was advised by dispatch of the situation, including information regarding the stolen Cadillac. He and Officer Kenny Prentice were able to follow the automobile for a period of time. After verifying that it was the stolen automobile, he activated his emergency equipment.

At that time, the vehicle fled at a high rate of speed, traveling over 100 miles per hour on several occasions and forcing several vehicles off the road. The suspects finally turned onto a dead end street. The individuals exited the vehicle and ran into the woods. The driver and front seat passenger were black males, while the back seat was occupied by a white male and a third black male. Sheriff Kilpatrick and Officer Prentice pursued the individuals on foot and were able to apprehend one of the suspects. The three remaining suspects were eventually apprehended and transported to Hohenwald City Hall. A blue bandana, blue shirt with white print, and stockings were recovered from the area around the vehicle.

Stefon Copeland, a sixteen-year old, was one of the individuals apprehended that day. He testified at trial that he, [the Appellant], and another individual planned to escape from the New Hope Facility. The three later included [co-defendant Nathaniel Lee Jackson] in the plans when he told them that his grandmother's house was located in Hohenwald. Mr. Copeland initially thought that the Walnut Street home belonged to . . . Jackson's grandmother, but realized differently when . . . Jackson kicked in the door. According to Mr. Copeland, while . . . Jackson was breaking-into the home, the three other individuals hid in a shed on the property. Once they gained access to the house, Mr. Copeland went to the kitchen to find something to drink while . . . Jackson rummaged through a closet where he found a suitcase containing a hatchet, duct tape, and twine. Mr. Copeland testified that . . . Jackson was responsible for tying Mrs. Dobson up and that . . . Jackson and [the Appellant] moved Mrs. Dobson to another room. . . . Jones wore a bandana on his face while the three other individuals wore stockings over their heads. When the individuals left the home in the Cadillac, [the Appellant] and Mr. Copeland sat in the front seat, while . . . Jackson and another individual were in the back seat. According to Mr. Copeland, [the Appellant] was the driver of the stolen vehicle.

Upon his return to Hohenwald, Lieutenant Greg Wise investigated the scene and took a statement from Mrs. Dobson. He was able to determine that the back screen door had been pried open and the back door had been kicked in. He noticed a large muddy footprint on the white part of the wooden door. He recovered a tack hammer, twine, cane, Pepsi bottle, hatchet, and black shirt from the home on Walnut Street. Lieutenant Wise also took several photographs of Mrs. Dobson's broken finger and the bruises on her wrists.

Lieutenant Wise interviewed all four suspects. They were all read their Miranda rights and indicated their understanding of those rights. Both . . . Jackson and [the Appellant] signed waivers of their right to remain silent, but neither wished to speak with Lieutenant Wise. . . . Jackson and [the Appellant] later both gave statements to Lieutenant Wise.

State v. Nathaniel Lee Jackson & Kenneth J. Jones, No. M2002-02248-CCA-R3-CD (Tenn. Crim. App. at Nashville, June 7, 2004) (footnote omitted). The Appellant, who was age sixteen at the time

of the offenses and age seventeen at the time of trial,¹ executed a written waiver of his right to trial by jury. A bench trial was held, and the Appellant was convicted of aggravated kidnapping, aggravated robbery, and felony evading arrest. The trial court ordered that the sentences be served concurrently, resulting in an effective sentence of twelve years. This court affirmed the convictions and sentences on direct appeal. *Id.*

On May 31, 2005, the Appellant filed a *pro se* petition for post-conviction relief. He was appointed counsel, who subsequently filed an amended petition alleging that the Appellant's waiver of his right to trial by jury was not entered knowingly and intelligently and, further, asserting numerous claims related to ineffective assistance of trial counsel. The post-conviction court held a hearing on April 21, 2006. On December 28, 2006, the post-conviction court entered an order denying the petition for post-conviction relief. The Appellant timely appealed to this court.

Analysis

In order to prevail on a post-conviction petition, the petitioner must establish that his conviction or sentence is void or voidable due to the abridgement of a constitutional right. T.C.A. § 40-30-103 (2003); *Howell v. State*, 151 S.W.3d 450, 460 (Tenn. 2004). In a post-conviction proceeding, the burden is on the petitioner to prove his allegations by clear and convincing evidence. T.C.A. § 40-30-110(f) (2003). Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992).

Both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminally accused the right to representation by counsel. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Both the United States Supreme Court and our supreme court have recognized that the right to such representation encompasses the right to “reasonably effective” assistance, that is representation within the range of competence demanded of attorneys in criminal cases. *Id.* To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Overton v. State*, 874 S.W.2d 6, 11 (Tenn. 1994); *Butler v. State*, 789 S.W.2d 898, 899 (Tenn. 1990)). Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. *Nichols v. State*, 90 S.W.3d 576, 586 (Tenn. 2002).

To prove a deficiency in representation, the petitioner must show that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms. *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. at

¹The Appellant subsequently appealed the decision of the juvenile court to transfer him and co-defendant Jackson to stand trial as adults, but the decision was affirmed on direct appeal. *State v. Nathaniel Lee Jackson & Kenneth J. Jones*, No. M2002-02248-CCA-R3-CD.

2065; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). To establish that a deficiency resulted in prejudice, a petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 370 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068)). This court has held:

Where a claim of incompetency of counsel is alleged, this Court will not reverse the finding of the trial judge dismissing such petition if the action of trial counsel was based upon legitimate trial tactics and strategy. *State v. Martin*, 627 S.W.2d 139 (Tenn. Cr. App. 1981). However, if the record shows the action of trial counsel, in the circumstances shown, has no rational or logical basis, then the legitimacy of the tactics employed must be scrutinized under the requirement of *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975).

State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

In reviewing counsel’s conduct, a “fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *State v. Honeycutt*, 54 S.W.3d 762, 768 (Tenn. 2001). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997); *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982).

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *Burns*, 6 S.W.3d at 461. A trial court’s findings of fact underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d)). However, conclusions of law are reviewed under a purely *de novo* standard, with no presumption of correctness. *Id.* at 458.

A. Waiver of a Jury Trial

The Appellant asserts that the primary issue in this appeal is whether he made a knowing and intelligent waiver of his right to a jury trial. In this case, the Appellant signed a written waiver of his right to a trial by jury, opting instead for a bench trial. The Appellant argues that he made this decision on the advice of counsel without fully understanding the consequences of such waiver. Furthermore, the Appellant argues that trial courts in Tennessee should be required to engage in a colloquy with a defendant when accepting the waiver of a trial by jury, in order for it to determine whether the waiver is knowing, voluntary, and intelligent.

The State contends that the Appellant waived this issue by failing to raise it in a motion for new trial or on direct appeal.² Alternatively, the State submits that the record supports the post-conviction court's findings that the Appellant knowingly and intelligently waived his right to trial by jury in this case. The State further argues that Tenn. R. Crim. P. 23 does not require a trial court to engage in a dialogue with a defendant prior to its accepting a written waiver of jury trial. Finally, the State argues that the Appellant presented no evidence, had the Appellant not sought a bench trial, that the outcome would have been different in any way.

The right to trial by jury is fundamental to the American scheme of justice. *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447 (1968); *see also* U.S. CONST. art. III, § 2, cl. 3 (1787); U.S. CONST. amend. 6 (1791); TENN. CONST. art. I, § 6 (1870). Although there is no common law right to waive a jury trial, *Singer v. United States*, 380 U.S. 24, 31, 85 S. Ct. 783, 788 (1965), nothing prohibits the legislature from conferring such a right under the appropriate safeguards. *State v. Durso*, 645 S.W.2d 753, 758 (Tenn. 1983); *see also Patton v. United States*, 281 U.S. 276, 312, 50 S. Ct. 253, 263 (1930) (holding that right to jury trial may be waived).

Rule 23 of the Tennessee Rules of Criminal Procedure provides that “[i]n all criminal cases except small offenses, the defendant is entitled to a jury trial unless waived.” Tenn. R. Crim. P. 23(a). Rule 23 requires that a waiver of jury trial: (1) be in writing; (2) have the consent of the district attorney general; and (3) have the approval of the court.³ Tenn. R. Crim. P. 23(b)(2).

In *State v. Ellis*, 953 S.W.2d 216, 220 (Tenn. Crim. App. 1997), the trial court held a bench trial and found the defendant guilty of theft, entering judgment after the defendant failed to make timely restitution. The trial court had allowed entry of said waiver upon a brief exchange with defense counsel prior to trial. *Id.* On appeal, this court noted that the defendant had not executed a written waiver of his right to a jury trial and that “the record [was] silent as to whether the [defendant] personally relinquished his right to a jury trial.” *Id.* at 221. This court stressed that “the right to a jury trial is a right personal to the defendant and cannot be waived absent his personal

²Generally, “[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented,” with certain exceptions not applicable in the present case. In this case, the record of the post-conviction proceedings reveals that the State did not assert the defense of waiver at the post-conviction hearing, but raised the issue for the first time in this court. In failing to raise the issue of waiver in the post-conviction court, the State denied the Appellant an opportunity to rebut the presumption that this issue has been waived. *See* T.C.A. § 40-30-110(f); *see also Walsh v. State*, 166 S.W.3d 641, 645-46 (Tenn. 2005). Accordingly, we conclude that the State’s waiver argument has itself been waived. “Issues not addressed in the post-conviction court will generally not be addressed on appeal.” *Walsh*, 166 S.W.3d at 645-46 (citing *Rickman v. State*, 972 S.W.2d 687, 691 (Tenn. Crim. App. 1997); *State v. White*, 635 S.W.2d 396, 397-98 (Tenn. 1982) (rejecting an argument presented by the State for the first time on appeal)). As such, the State may not raise the issue of waiver for the first time in this court. *Walsh*, 166 S.W.3d at 645-46.

³Rule 23 also provides: “The defendant may waive a jury trial at any time before the jury is sworn.” Tenn. R. Crim. P. 23(b)(1).

relinquishment of that right.” *Id.* (citing *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S. Ct. 646, 657 (1988)). We further stated:

[B]ecause only the accused can sign a written waiver of his right to a jury trial, it is incongruous to hold that counsel may accomplish orally what he may not accomplish by written word. . . .

Thus, *absent a written waiver of the right*, in order for a criminal defendant to effectively waive his right to a jury trial, he must first be advised by the court of his right to a jury trial, and then, must personally waive the right in open court for the record. Although not required by Rule 23, the preferred practice, *in absence of a written waiver*, is for the trial court to inform the defendant of his right to trial by jury, the nature of the right, and the consequences of waiving it.

Id. at 221-22 (emphasis added).

It is undisputed that the Appellant in the present case executed a written waiver of trial by jury on June 5, 2002. Trial counsel, the district attorney general, and the trial court also signed this document. The record additionally reflects that the trial court engaged in the following colloquy with the Appellant prior to conducting a bench trial:

The Court: Mr. Jones, I have here a motion to waive a trial by jury, and it's signed Kenneth Jones, is that your signature?

The [Appellant]: Yes, sir.

The Court: Do you understand that you have an absolute right to have a jury impaneled, and it would be the jury rather than the court, that would determine whether you are guilty or not guilty of any offense in this case?

The [Appellant]: Yes, sir.

The Court: And is it your desire, then, to waive your right to a trial by jury and have the case submitted to the court for that determination?

(The [Appellant] and counsel conferred.)

The [Appellant]: I don't want no jury.

[Trial Counsel]: He says he doesn't want a jury.

The Court: Okay, I thought he said something about jail.

[Trial Counsel]: No, sir.

The Court: You've decided to waive your right to a trial by jury?

(The [Appellant] and counsel conferred.)

The Court: You want to give it up?

The [Appellant]: I don't want no jury.

The Court: All right. Thank you, you may be seated.

At the post-conviction hearing, trial counsel acknowledged that he had advised the Appellant to waive a jury trial based upon his belief that, in light of the overwhelming evidence of his client's guilt, a jury trial "would not go well because of the vulnerability of the victim" and that his client "would have had exposure to tremendous fines." He testified that he had explained these considerations to the Appellant prior to trial and, further, that the Appellant was in complete agreement that he should waive a jury trial.

The post-conviction court found that the Appellant knowingly and intelligently waived his right to trial by jury in this case. We agree that the requirements of Tenn. R. Crim. P. 23 were satisfied. Moreover, we conclude that trial counsel's advice, which the record clearly reflects was informed and based upon adequate preparation, did not constitute deficient performance. Moreover, the Appellant has failed to establish prejudice resulting from his personal decision to proceed to a bench trial. Accordingly, the post-conviction court correctly denied relief on this basis, and the issue is without merit.

B. Ineffective Assistance of Counsel

1. Failure to File Motion to Sever Cases

The Appellant argues that trial counsel provided ineffective assistance based upon a failure to sever his case from that of his co-defendant, Nathaniel Lee Jackson, pursuant to Rule 14(c)(1) of the Tennessee Rules of Criminal Procedure. During the bench trial, the State introduced into evidence the statements that Jackson and the Appellant made to police after their arrest. These statements were introduced through Lieutenant Greg Wise of the Hohenwald Police Department, who read them into the record. The Appellant argues that trial counsel should have filed a motion to sever the cases based upon the State's intent to use Jackson's statement against him and that the failure to do so constituted ineffective assistance.⁴ Conversely, the State argues that the record supports a finding that the decision not to file a motion to sever the cases was one based upon reasonable trial strategy and, further, that the Appellant has failed to establish prejudice on this claim. It further asserts that the State had a great deal of evidence to support the facts alleged in the case and that the trial court would have had exposure to these facts regardless of whether the two defendants had separate trials.

⁴ Although it was not raised in his appellate brief, the Appellant alleged a *Bruton* violation at oral argument, based upon the trial court's admission of co-defendant Jackson's statement into evidence at trial. Notwithstanding that the Appellant has waived this issue on appeal, we further recognize the established principle that "the mere finding of a *Bruton* error in the course of the trial 'does not automatically require reversal of the ensuing criminal conviction.'" *King v. State*, 989 S.W.2d 319, 329 (Tenn. 1999) (citing *Schneble v. Florida*, 405 U.S. 427, 430, 92 S. Ct. 1056, 1059 (1972)); see also *Cruz v. New York*, 481 U.S. 186, 194, 107 S. Ct. 1714, 1719 (1987); *State v. Porterfield*, 746 S.W.2d 441, 446 (Tenn. 1988). "In cases where the properly admitted evidence of guilt is overwhelming, and the prejudicial effect of the codefendant's confession is insignificant by comparison, then the improper admission is harmless beyond a reasonable doubt." *King*, 989 S.W.2d at 329-30 (citing *Schneble*, 405 U.S. at 430, 92 S. Ct. at 1059). Upon thorough review of the record, we conclude that the trial court's admission of Jackson's statement in the present case was indeed harmless.

At the time of trial, Rule 14(c) of the Tennessee Rules of Criminal Procedure provided in relevant part:

(1) If a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to the defendant but is not admissible against the defendant, the court shall determine whether the State intends to offer the statement in evidence at trial. If so, the court shall require the prosecuting attorney to elect one of the following courses:

(i) a joint trial at which the statement is not admitted into evidence or at which, if admitted, the statement would not constitute error; or

(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, if, as deleted, the confession will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

Tenn. R. Crim. P. 14(c)(1).

At the post-conviction hearing, trial counsel specifically testified that although he knew the statement of Jackson incriminated the Appellant, he made a tactical decision not to file a motion for severance because of the overwhelming evidence against his client, as well as because he hoped to receive leniency from the trial court based upon the age of the Appellant and co-defendant Jackson, who were both minors. He stated that, based on these considerations, his strategy was “to let a [j]udge hear the facts of this case and make a decision and consider the age and lack of criminal adult history and . . . the state of the Juvenile Court record.” Trial counsel additionally testified that he was not sure that a motion for severance would have been successful. This court has repeatedly held that we cannot second-guess a tactical and strategic choice made by trial counsel unless those choices were uninformed because of inadequate preparation. *Hellard*, 629 S.W.2d at 9; *Alley v. State*, 958 S.W.2d 138, 149 (Tenn. Crim. App. 1997). “Trial counsel may not be deemed ineffective merely because a different procedure or strategy might have produced a different result.” *Alley*, 958 S.W.2d at 149.

We conclude that trial counsel’s decision not to move for a severance in this case appears to have been informed and based on adequate preparation. Thus, we may not second-guess counsel in this regard. Moreover, we are constrained to note that the Appellant has failed to make specific allegations of how trial counsel’s failure to seek a severance resulted in prejudice to the defense. Thus, our review of the record leads us to conclude that the Appellant failed to establish ineffective assistance of counsel on this claim.

2. Failure to File Motion to Suppress Statement of the Appellant

The Appellant next contends that trial counsel provided ineffective assistance through his failure to file a motion to suppress his statement to police, which was introduced at trial. In support of his apparent contention that the use of this statement violated his *Miranda* rights, he relies upon the following facts recited by this court on direct appeal:

Both Appellant Jackson and Appellant Jones signed waivers of their right to remain silent, but neither wished to speak with Lieutenant Wise. Appellant Jackson and Appellant Jones later both gave statements to Lieutenant Wise.

State v. Nathaniel Lee Jackson and Kenneth J. Jones, No. M2002-02248-CCA-R3-CD. The Appellant states in his brief: “Although the Court of Appeals opinion reflects that initially [the] Appellant had exercised his *Miranda* [r]ights, [t]rial [c]ounsel made no effort to attempt to suppress the statement.” Without offering this court any independent factual support on appeal, the Appellant then inquires, “Was the statement truly voluntary? After [the Appellant] initially chose to remain silent[,] why did he change his mind? Was he threatened, promised something, or coerced?” The Appellant finally offers: “Pursuing a motion to suppress such evidence certainly would have answered these questions and determined whether the *Miranda* waiver was valid.”

The State counters by relying upon trial counsel’s testimony that he saw no ground upon which to pursue such a motion and further asserts that the Appellant offered no evidence that such a motion would have been successful. Trial counsel testified at the post-conviction hearing that the signed waiver of *Miranda* rights accompanying the Appellant’s written statement to police appeared to be valid and that “[t]here was nothing about [the Appellant] that gave [trial counsel] any idea that he was unable to understand this very simple waiver.” Trial counsel testified that he decided against filing a motion to suppress the statement because “it would not have been worthwhile.”

We conclude that the Appellant has failed to carry his burden on this issue. The Appellant bears the burden of proving factual allegations in a petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f); *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006). In order to succeed in proving ineffective assistance of counsel with respect to counsel’s failure to file a motion to suppress the evidence, the Appellant must satisfy both prongs of the *Strickland* test, showing both that counsel’s failure to file the motion was deficient and that the deficient performance prejudiced the defense. *Vaughn*, 202 S.W.3d at 120 (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064-65). The Appellant did not establish that trial counsel’s decision to forego filing a motion to suppress in this case fell below “an objective standard of reasonableness under prevailing professional norms.” See *Goad*, 938 S.W.2d at 369. Moreover, the Appellant’s rhetorical assertions as to supposed violations of his *Miranda* rights do not approach a clear and convincing showing of prejudice, as is required for post-conviction relief. We conclude that the Appellant failed to establish both deficient performance and prejudice as to this claim, and, accordingly, it is without merit.

3. Failure to Interview State Witnesses

The Appellant, without offering an argument in support of his position, alleges that trial counsel provided ineffective assistance of counsel by failing to interview any of the State's witnesses prior to trial. The State argues that this issue has been waived. Rule 27(a) of the Tennessee Rules of Appellate Procedure includes the following requirement for briefs submitted to this court:

(7) An argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on

Although the Appellant has failed to comply with this rule, Rule 2 of the Tennessee Rules of Appellate Procedure allows this court to suspend application of these requirements for good cause in the interest of expediting a decision upon any matter. We will apply Rule 2 in this case in order to consider this claim on its merits, based upon the record presently before this court.

The Appellant's amended petition for post-conviction relief did not allege that trial counsel was ineffective based upon his failure to interview witnesses for the State prior to trial. At the post-conviction hearing, trial counsel was questioned on this issue, however, and he testified that he did not recall conducting interviews with Mrs. Dobson, the victim in the case; Stephan Copeland, one of the teenagers who was apprehended with the Appellant and who provided testimony at trial; Department of Children's Services worker Lisa Morgan, who was involved with New Hope Facility, from which the young men had escaped; Lieutenant Greg Wise, or Sheriff Dewayne Kilpatrick. Trial counsel testified that he had no reason to interview these witnesses, because the State was forthcoming regarding its intended proof and provided him complete access to all of its files.

We conclude that the decision to forego interviewing these witnesses was not unreasonable under the circumstances and did not constitute deficient performance. Moreover, the Appellant failed to offer proof at the post-conviction hearing as to how this strategic decision of trial counsel prejudiced the defense. The Appellant failed to establish either prong of the *Strickland* test regarding this claim, and, accordingly, we conclude that the issue is without merit.

4. Failure to Object to State's Notice of Intent to Seek Enhanced Punishment

The Appellant alleges ineffective assistance based upon trial counsel's failure to object to the State's untimely notice of its intent to seek enhanced punishment, which he contends would have allowed the Appellant a reasonable continuance of trial pursuant to Rule 12.3 of the Tennessee Rules of Criminal Procedure. He argues that Rule 12.3(a) requires the State to file such notice "not less than ten (10) days before trial," and that the State filed its notice in this case only seven days before trial. The Appellant confuses the notice to seek enhanced punishment provisions of Tenn. R. Crim. P. 12.3(a), which refers to sentencing enhancement based upon multiple, persistent, or career offender status, with the sentencing provision of Tennessee Code Annotated section 40-35-114, which permits enhancement of a sentence within the range based upon the presence of enumerated

enhancement factors. Because the State did not seek enhanced punishment of the Appellant as a multiple, persistent, or career offender, Rule 12.3(a) has no application to this case. Moreover, contrary to the Appellant's argument, we would note that our sentencing law contains no provision which requires the State to file notice of enhancement factors prior to trial. *See* T.C.A. § 40-35-202(b) (2003). Accordingly, this issue is without merit.

5. Failure to File Mitigating Factors

Finally, the Appellant asserts that trial counsel was ineffective for failing to file with the trial court a list of applicable mitigating factors prior to the sentencing hearing, "nor did he devote much of his time in closing argument to articulate the statutory mitigating factors that applied." The Appellant argues that trial counsel's representation on this issue was particularly deficient for failing to draw the trial court's attention to the Appellant's age at the time of the offense, which was sixteen. The State, however, correctly notes that the Appellant has failed to allege the existence of resulting prejudice as to this issue. The State further points out that, despite trial counsel's failure to file such mitigating factors prior to sentencing, the trial court allowed trial counsel to argue in support of applying certain factors at the sentencing hearing and that the trial court specifically considered the Appellant's young age.

The Appellant was sentenced to twelve years for aggravated robbery as a Range I, standard offender, twelve years for aggravated kidnapping as a Range I, violent offender, and four years for evading arrest as a Range I, standard offender. The trial court ordered these sentences to be served concurrently. This court affirmed the effective sentence of twelve years on direct appeal. *State v. Nathaniel Lee Jackson & Kenneth J. Jones*, No. M2002-02248-CCA-R3-CD. In reaching this result, the court noted the following:

In imposing Appellant Jones's sentence, the State proposed several statutory enhancement factors and the [A]ppellant proposed several mitigating factors. After listening to the proof, the trial court found several enhancement factors to be applicable: (1) that Appellant Jones was a leader in the commission of an offense involving two or more criminal actors, Tenn.Code Ann. § 40-35-114(3); (2) the victim was particularly vulnerable because of her age, Tenn.Code Ann. § 40-35-114(5); (3) the crime was committed under circumstances under which the potential for bodily injury to the victim was great, Tenn.Code Ann. § 40-35-114(17); and (4) Appellant Jones had no hesitation about committing a crime when the risk to human life was high,⁵ Tenn.Code Ann. § 40-35-114(10).

Id. As to mitigating factors, the court further recognized that the trial court considered the possible mitigating factor that the Appellant, because of his youth, lacked substantial judgment in committing the offense, *see* T.C.A. § 40-35-113(6), and found that the factor either did not apply or was entitled

⁵This enhancement factor applied only to the Appellant's conviction for felony evading arrest.

to little weight, stating that “even young people know not to injure or threaten injury to people with deadly weapons.” *Id.*

At the post-conviction hearing, trial counsel testified that, despite his failure to file mitigating factors, the trial court permitted him to argue them at the sentencing hearing. In light of this testimony, as well as the transcript from the sentencing hearing, the Appellant’s present contention that trial counsel failed to draw the court’s attention to the Appellant’s age is not supported by the record. As the Appellant failed to establish deficient performance or prejudice, we conclude that the post-conviction court properly denied relief as to this issue.

CONCLUSION

Based upon the foregoing, the judgment of the Lewis County Circuit Court is affirmed.

DAVID G. HAYES, JUDGE